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Supreme Court, U.S.
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No. 03-1239

IN THE

Supreme Court of the United States

FRANK P. FACONTI,
Petitioner

v.

JOHN E. POTTER,
POSTMASTER GENERAL OF THE UNITED STATES
Respondent

On Petition For A Writ of Certiorari To The
United States Court of Appeals For the Second Circuit

PETITION FOR REHEARING

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Reasons For Granting The Petition For Rehearing

I. The Court should consider and grant this Petition for Rehearing because this Petition constitutes an "intervening circumstance of ...substantial effect" to wit, the purposes of the Rehabilitation Act of 1973 are being ignored by federal agencies in the processing of CSRS/FERS disability retirement applications. and puts forth a "substantial ground not previously presented" in the Petition for Certiorari, to wit, (2) the use of Judicial Estoppel as a basis for granting summary judgment in various Circuit Courts of Appeal is inconsistent and at times contrary to the principles established by this Court.

One permissible ground for a petition for rehearing of an order denying a petition for writ of certiorari is an "intervening circumstance of substantial effect." Supreme Ct. Rule 44(2). As will be set forth below, the 1999 decision of the Supreme Court in ***Cleveland v. Policy Mgmt. Sys., Inc.*** and the purposes of the Rehabilitation Act of 1973 constitute an "intervening circumstance of...substantial effect."

As stated in the Rehabilitation Act of 1973, "The purposes of the Act" in item (2) are, "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living."

In these cases, Magistrate Robert M. Levy stated in his decision, "...a person who successfully applies for a CSRS (*Civil Service Retirement System*) disability retirement

annuity cannot, by definition, be a 'qualified individual with a disability' under the Rehabilitation Act." This contention is contrary to the stated purpose (2) of the Rehabilitation Act for the federal government to play a "leadership role in employment of individuals with disabilities," as it allows federal agencies to circumvent their requirements to accommodate/reassign applicants for both CSRS and FERS disability retirement by rubber-stamping such disability retirement applications. Then, once the employee is granted disability retirement, the agency can avoid the responsibility for failing to accommodate/reassign a disabled employee because the employee can no longer be considered 'a qualified individual with a disability' within the meaning of the Rehabilitation Act of 1973. This circular reasoning will enable federal agencies a loophole whereby they can simply refuse to make any effort to accommodate any applicant for CSRS/FERS disability retirement and, once the Office of Personnel Management (OPM) grants a disability retirement to an employee who otherwise could have been, and by law should have been accommodated, that employee will not only have been discriminated against by the federal agency's failure to accommodate the disability, but the agency will ostensibly be off the hook by arguing that once OPM granted disability retirement, the employee can no longer be considered a qualified individual with a disability and that employee will have no legal recourse. Instead of the federal government playing a leadership role in employing the disabled, such a situation will allow federal agencies to purge their roles of disabled employees, rather than accommodate disabled employees, as required by the Rehabilitation Act.

This is the exact situation in my case and, in some ways, the error is similar to that which this Court corrected in ***Cleveland v. Policy Mgmt. Sys., Inc.***, 526 U.S. 795 (1999), where the District Court erroneously held that, "Cleveland, by applying for and receiving SSDI benefits, had conceded that she was totally disabled. And that fact, the court concluded, now estopped Cleveland from proving an essential element of her ADA claim, namely that she could 'perform the essential functions' of her job, at least with 'reasonable accommodation.'" The difference in the cases is that the District Court made the same erroneous conclusion, only in my cases it's about CSRS disability retirement being granted by OPM where a federal agency had an obligation under the law, both as a leader in employment of the disabled and under the Federal Personnel Manual (FPM) (reprinted in the **Petition for Writ of Certiorari Appendix I pages 107a to 131a** as an excerpt from **Appellant Brief** in Case No. 02-6320 - **Appendix Exh. E**) to "...**exhaust all reasonable efforts to alleviate any service deficiencies through accommodation before it counsels an employee to seek disability retirement or supports an employee's request for disability retirement**" and to "...**review all vacant positions under its jurisdiction, at the same grade or pay level and tenure in the commuting area, to determine if the employee meets the minimum qualification standards for any vacant position.**" If anything, my cases cry out for justice louder than the ***Cleveland*** case for the above-cited reasons.

On the back of the actual form the federal agency must fill out to document their efforts, the **Agency Certification of Reassignment and Accommodation Efforts** form

(**Appellant Brief** in Case No. 02-6318, **Appendix Exhibit E in the Record on Appeal**), there is another form with instructions for the agency, the **Guidelines for Coordinator for Employment of the Handicapped** form (**Appellant Brief** in Case No. 02-6318, **Appendix Exh. D in the Record on Appeal**). In part, the instructions state –

> The **law** requires that where an employee who otherwise would be eligible for disability retirement initiates an application, the agency must review all vacant positions under its jurisdiction at the same grade or pay level and tenure in the commuting area, to determine if the employee meets the minimum qualification standards for any vacant position.

These instructions are the **law** for **all** federal agencies and the wording is clear – "where an employee who otherwise would be eligible for disability retirement," can easily be construed to mean that the employee is capable of being granted a disability retirement, yet federal agencies must still try to accommodate/reassign the disabled employee. The statement, "the agency **must** review all vacant positions under its jurisdiction," **cannot** be construed to mean to do **nothing**! It is indisputable evidence in these cases that the agency, as shown by the **Agency Certification** form the agency itself filled out (or rather failed to fill out with any documentation of accommodation/reassignment efforts in response to the questions, as detailed in my Petition for Writ of Certiorari) that the agency made **no** effort to accommodate/reassign me.

It has been legally decided by the Magistrate that I never requested an accommodation through the proper chain of command, but the Courts and even the EEOC are wrong in this matter, as all federal agencies are supposed to have in place a **Coordinator for the Employment of the Handicapped** whose specific job it is to perform the tasks detailed above when an employee files an application for CSRS/FERS disability retirement. An employee's supervisor has no knowledge of the accommodation/reassignment process, or these instructions, which are specifically for this Coordinator for Employment of the Handicapped. I would venture to predict that if the Court were to check to see if federal agencies have a person with such a title or performing the specific function of this position, there would be basically non-compliance with these legal requirements, as federal agencies do not take the Rehabilitation Act's stated purpose seriously. As proof of this assertion, I evidence the Magistrate's own statement regarding these very instructions from his decision at footnote 17, "As defendant points out, this obligation on the part of federal agencies to determine whether or not there are reasonable accommodations for an employee who has filed for disability retirement appears to exist in substantial part for the benefit of the government, not the employee." This outrageous statement by a Federal Magistrate perpetuates the climate that ignores the Rehabilitation Act's stated purpose under (1) "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through - (2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities." The FPM,

which was the OPM publication provided to all federal agencies to assist them in processing both CSRS and FERS disability retirement applications, states in **Section 60A2.1-4 Accommodation - B. Reasonable Accommodation,** "Reasonable Accommodation is any action that the agency would be obligated to take under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.)." Tying these Reasonable Accommodation obligations under the FPM to "any action that the agency would be obligated to take under the Rehabilitation Act" clearly establishes the Magistrate is wrong. The existence of this obligation to accommodate the disabled employee who applies for CSRS/FERS disability retirement is not substantially for the benefit of the government, **it is for the disabled!** For the Supreme Court to ignore this case and allow a federal agency to discriminate against the disabled and get away with it is also wrong. A loophole for federal agencies to not only avoid playing a leadership role in the employment of the handicapped, but for purging the federal workforce of disabled employees must be seen as intervening circumstances of a substantial effect.

II. **The Court should consider and grant this Petition for Rehearing because this Petition puts forth a "substantial ground not previously presented" in the Petition for Writ of Certiorari, to wit, the use of Judicial Estoppel as a basis for granting summary judgment in various Circuit Courts of Appeal is inconsistent and at times contrary to the principles established by this Court.**

One permissible ground for a petition for rehearing of an order denying a petition for writ of certiorari is a "substantial ground not previously presented." Supreme Ct. Rule 44(2).

As will be fully set forth below, a substantial ground not previously presented in the Petition for Writ of Certiorari is presented herein, and provides further and compelling ground for this Court to grant the writ of certiorari in these cases.

Judicial Estoppel is different things to many different judges and magistrates throughout this great land of ours. It is, unfortunately, a tool which prevents a plaintiff from ever getting a jury of one's peers to hear the evidence and decide the issue(s) in a case. It allows judges and magistrates to decide what cases go to trial. If a plaintiff/appellant's case resides in a circuit where judicial estoppel is being granted only within very limited situations, (i.e. as in the D.C. Circuit which ruled in a 1980 case, ***Konstantinidis v. Chen***, 200 U.S. App. D.C. 69, 626 F.2d 933, 936-38, "The party seeking to invoke the estoppel, however, must have been an adverse party in the prior proceeding, must have acted in reliance upon his opponent's prior position, and must now face injury if a court were to permit his opponent to change positions."), and another case goes before a different circuit (i.e. my cases before the Second Circuit where judicial estoppel was defined as, "The requirements for judicial estoppel are as follows (*quoting* Bates, 997 F.2d 1037): 'first, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner.'"), we have two different sets of criteria for granting judicial estoppel and there is no equal justice. The Supreme Court needs to clearly define this substantial issue so that there is a consistency in the application of judicial estoppel.

Recent Supreme Court rulings, such as the ***Cleveland*** case and ***New Hampshire v. Maine*** 121 S.Ct. 1808 U.S., 2001, still leave too much power to grant summary judgment on the basis of judicial estoppel in one person's control at the District Court level. For example, in my cases, Magistrate Levy stated, "Faconti is judicially estopped – based on his previous statements to the OPM and SSA – from claiming that he was capable of performing the essential functions of the position for which he applied." Yet, in ***Cleveland***, the Supreme Court ruled that, "the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision." As noted in my Petition for Writ of Certiorari, the relevant employment decision was in March, 1993 when in both cases I claimed that the USPS discriminated against me by failing to select me for a position and awarding it to a non-disabled employee and by failing to accommodate my disability when the agency processed my CSRS disability retirement application. My application for SSA benefits that the Magistrate refers to was eight months **later**, and that request was denied, yet Magistrate Levy then goes on to detail my statement from a request for reconsideration which was written in 1994, one year **after** the relevant employment decision. I had been on Leave Without Pay, I had no job, no income and my CSRS disability retirement wasn't approved until January, 1994, so had the agency accommodated my disability in March, 1993, none of these statements would have been written and my condition, in all likelihood, would not have deteriorated. Even my letter to OPM requesting reconsideration, after my

disability was denied, was written six months **after** the relevant employment decision and it was written **because I had not been accommodated and my condition worsened because of the stress of having no job or income!**

My position in these current cases is based on the statement I made back in January, 1993 in my applicant's statement from my CSRS disability retirement application, (**Appellant Brief** in Case No. 02-6320 - **Appendix Exh. J**) in which I expressed a desire to be assigned to a station near my home, "Another possible alternative would be to place me as a Station Manager at a station that is within walking distance or a very short ride from my home (i. e. 11204, 11214, 11219)." This statement was made in January, 1993, **BEFORE** the statements the Magistrate used to grant summary judgment on the basis of judicial estoppel. Even allowing for Magistrate Levy's Second Circuit definition of judicial estoppel, it cannot be applied to my cases as it is the same factual statement as I stated in the first instance during the relevant employment decision. Everything that the defendant and Magistrate have claimed I stated as being a cause for judicial estoppel was **not** said in a **prior** proceeding, but rather **after** the relevant employment decision (from six months to a year), was directly the result of the agency's failure to accommodate my disability and related to a change in my physical condition brought on by the stress of my circumstances described above. Even in the EEO case and subsequent civil case filed in 2001, the relevant employment decision was in March, 1993, **prior** to any of the statements made which the Magistrate used to grant summary judgment on the basis of judicial estoppel. I was in no way trying to play 'fast and loose' with the courts.

Clearly, judicial estoppel was not appropriate in my cases and should never have been granted. It is on this basis that the Supreme Court needs to act and clarify that the use of judicial estoppel is not appropriate when the statements in question are made **after** the relevant employment event.

The ***New Hampshire v. Maine*** case references the same 1980 ***Konstantinidis v. Chen*** case cited above, which apparently is still considered good law, and which decision states in part, "The party seeking to invoke the estoppel, however, must have been an adverse party in the prior proceeding." Even the ***NH v. Maine*** case has the same set of circumstances, with both parties being involved in a previous case from 1970 and NH changing its position from that case, but in my case, the USPS was not a party in my SSA proceedings, nor were they a part of my request for reconsideration to OPM (all of which events happened **after** the relevant employment decision **and** my stating I desired to be accommodated/reassigned). Thus, these factors surrounding the Magistrate's granting of summary judgment on the basis of judicial estoppel create a question as to the selective, inconsistent and, in my case, inappropriate application of the doctrine of judicial estoppel, and most certainly also qualify as a substantial ground not previously presented.

CONCLUSION

The Petition for rehearing should be granted.

RULE 44.2
CERTIFICATE

I certify pursuant to Supreme Court Rule 44.2 that this petition for rehearing is restricted to intervening circumstances of a substantial or controlling effect or to substantial grounds not previously presented, and that it is presented in good faith and not for delay.